In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 967

ESTATE OF HUTCHEN UPSHAW, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court (Pet. App. 18a-40a) are not officially reported. The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 416 F. 2d 737.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1969. The petition for a writ of

certiorari was filed on December 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether both courts below correctly found that petitioner Ardenia Upshaw and her husband filed joint federal income tax returns for the years 1953 and 1958.

2. Whether Section 51(b)(1) of the Internal Revenue Code of 1939 and Section 6013(d)(3) of the 1954 Code, which impose joint and several liability on the makers of a joint federal income tax return, contravene the Fifth Amendment.

3. Whether, in reconstructing a taxpayer's income under the net worth method, it is proper to exclude accrued federal income tax liability from the computation.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 51 [as amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110] INDIVIDUAL RETURNS.

* * * *

(b) *Husband and Wife.*—

(1) *In general.*—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax

shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * *

(26 U.S.C. (1952 ed.) 51.)

Internal Revenue Code of 1954:

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

* * * *

(d) *Definitions.*—For purposes of this section—

* * * *

(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

(26 U.S.C. 6013.)

STATEMENT

During the taxable years here in issue, 1953 through 1958, petitioner Ardenia Upshaw was married to Hutchen Upshaw (R. 20).[1] Throughout this period,[2] Hutchen was engaged in various income-producing activities, including policy, lottery and bookmaking operations, money lending, rental operations,

---

[1] "R." refers to the appendix to petitioners' brief in the court of appeals which is lodged with this Court.

[2] Hutchen Uphaw died subsequent to the years in issue (R. 71). Ardenia Upshaw is a party to this proceeding both as administratrix of her deceased husband's estate and as a co-maker of joint tax returns with her husband for 1953 and 1958.

buying and selling stocks and other securities, and the operation of a tavern (Pet. App. 22a). Hutchen failed to maintain adequate books and records of his income (R. 37), in part to prevent the use as evidence against him of any records of his gambling activities (Pet. App. 25a).

For the years 1954-57, inclusive, Hutchen filed separate federal income tax returns (R. 21). For 1953, Hutchen and Ardenia both appeared as signatories on a joint return (R. 78). For 1958, their return, joint in form, was signed on their behalf by a certified public accountant pursuant to separate powers of attorney executed by Hutchen and Ardenia (R. 82, 89, 90).

The Commissioner determined deficiencies in income tax based on increases in Hutchen's net worth (Pet. App. 25a). Petitioners objected to the Commissioner's net worth computation on the ground that he had failed to allow as a liability accrued federal income taxes (R. 33; Pet. 13-18). Subject to this objection and a second objection not relevant here, the parties stipulated on the basis of the Commissioner's net worth computation that adjusted gross income had been understated as follows (R. 27; Pet. App. 25a):

Year	Amount of Understatement
1953*	$ 19,613.13
1954	37,964.31
1955	99,691.94
1956	111,702.15
1957	159,915.18
1958*	173,184.59

* Joint return of Hutchen and Ardenia Upshaw.

A petition for a redetermination of the deficiencies was filed in the Tax Court. Following a stipulation of facts (R. 20-39) and a trial on the merits, the Tax Court accepted the Commissioner's determinations with minor alterations (Pet. App. 30a-33a) and also sustained the imposition of civil fraud penalties (Pet. App. 34a-40a). On appeal, the Seventh Circuit affirmed (Pet. App. 1a-17a).

ARGUMENT

The decision below, affirming that of the Tax Court with respect to both the amount of the deficiencies and the imposition of civil fraud penalties, is correct. There is no conflict or any other basis for further review by this Court.

1. Ardenia contended for the first time in the court of appeals that she and her husband did not file joint returns for 1953 and 1958 (Pet. App. 11a). In their duly verified petition to the Tax Court, they specifically alleged the contrary (R. 7), and, indeed, Ardenia stipulated (R. 20) that joint returns were filed for both years. The Tax Court's finding to this effect (Pet. App. 2a) is supported by this and other evidence (R. 78-93). Ardenia does not deny that she signed the 1953 return; nor does she allege that her signature was procured by fraud or duress. Although she did not sign the 1958 return (R. 82), the law is settled that a return may be a joint return, even though the wife does not sign it, provided she intends to file a joint return. *Heim* v. *Commissioner*, 251 F. 2d 44 (C.A. 8); *Kann* v. *Commissioner*, 210 F. 2d 247 (C.A. 3); *O'Connor* v. *Commissioner*, 412

F. 2d 304 (C.A. 2), taxpayers' petition for certiorari pending, No. 886, this Term. Ardenia does not deny such intent as to 1958, and there is no evidence in the record to support such a denial. To the contrary, all of the relevant facts, and particularly her granting of a power of attorney to the accountant who prepared the 1958 return (R. 89), indicate that she fully intended to file a joint return with her husband for that year. In all events, the question of Ardenia's intent as to both 1953 and 1958 is one of fact, *Federbush* v. *Commissioner*, 325 F. 2d 1, 2 (C.A. 2), and this case thus comes within the established principle that this Court will not usually review a finding of fact concurred in by both courts below. *Comstock* v. *Group of Investors*, 335 U.S. 211, 213-214.

2. Sections 51(b)(1) of the 1939 Code, pp. 2-3, *supra*, and 6013(d)(3) of the 1954 Code, p. 3, *supra*, provide that if a joint return is made, the liability with respect to the tax on the aggregate income shall be joint and several. Consistently with the plain mandate of these provisions and pertinent legislative history,[3] the courts have uniformly held that, unless a wife joins in a return as a result of her husband's fraud or duress, she is liable for all addi-

[3] The provision imposing joint and several liability on both spouses in the case of joint returns was incorporated into the federal tax law in the Revenue Act of 1938, c. 289, 52 Stat. 447, Section 51(b). See the Report of a Subcommittee of the Committee on Ways and Means on Proposed Revision of the Revenue Laws, 75th Cong., 3d Sess., p. 50; H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 29-30.

tional taxes attributable to her husband's understated income and for all fraud penalties attributable to his conduct, even if she is entirely innocent and totally without knowledge of the understated income and fraudulent conduct. *Horn* v. *Commissioner*, 387 F. 2d 621 (C.A. 5); *Moore* v. *United States*, 360 F. 2d 353, 357 (C.A. 4), certiorari denied, 385 U.S. 1001; *Furnish* v. *Commissioner*, 262 F. 2d 727 (C.A. 9); *Prokop* v. *Commissioner*, 254 F. 2d 544 (C.A. 7); *Payne* v. *United States*, 247 F. 2d 481 (C.A. 8); *Kann* v. *Commissioner*, *supra*; *Howell* v. *Commissioner*, 175 F. 2d 240 (C.A. 6).[4] Petitioners give no reason and cite no authority for their assertion that this long-

---

[4] In *Scudder* v. *Commissioner*, 405 F. 2d 222 (C.A. 6), petitions for rehearing denied, 410 F. 2d 686, taxpayer's petition for certiorari denied, 396 U.S. 886, the Sixth Circuit granted partial relief to a joint-maker wife from her joint and several liability on the ground that part of the unreported income of her husband had been embezzled or otherwise illegally taken from her directly or indirectly. The court found in the unusual circumstances of *Scudder*, 405 F. 2d at 226, that the husband's conduct was equivalent to fraud, trickery and duress, which, as we have noted, may exempt a spouse from liability even though a joint return is signed. It also held that the innocent spouse was responsible for taxes and fraud penalties that were not attributable to embezzled or illegally taken funds. In *Sharwell* v. *Commissioner*, (C.A. 6), decided December 24, 1969, the Sixth Circuit remanded to the Tax Court for a determination as to whether the rationale of its earlier *Scudder* decision was applicable. While we disagree with *Scudder* and *Sharwell* insofar as they would allow partial relief to wronged spouses, those cases plainly have no bearing here, since Hutchen at no time embezzled, or otherwise wrongfully obtained, funds from Ardenia.

standing rule of joint and several liability violates the Fifth Amendment, and we know of no basis for such a constitutional claim.

3. There is no merit to petitioners' contention that the Commissioner's net worth computation is erroneous because accrued federal income taxes were not taken into account as a liability. As this Court observed in *Holland* v. *United States*, 348 U.S. 121, 131, the net worth method is not a method of accounting. Its purpose is to arrive as nearly as possible at a taxpayer's correct, taxable income—*i.e.*, the taxable income which would have appeared on the tax returns had the taxpayer properly and accurately reported all income and allowable deductions. Tax liability is computed on the basis of a taxpayer's income before taxes (see Section 275 of the 1954 Code). To reflect such taxes in the net worth computation, as petitioners urge, would have the effect of allowing an impermissible deduction for such taxes, and would result in a lower taxable income and lower tax liability than if income and deductions had been reported properly in the first instance. The courts below thus were correct in accepting the Commissioner's net worth computation. Cf. *Romm* v. *Commissioner*, 255 F. 2d 698 (C.A. 4); *Schultz* v. *Commissioner*, 278 F. 2d 927, 931-933 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

WILLIAM A. FRIEDLANDER,
STEPHEN H. HUTZELMAN,
Attorneys.

FEBRUARY 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 376485 498